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IN THE

Supreme Court of the United States

October Term 1967

No. 880

WILLIAM C. BRAY,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Orange.

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WILLIAM C. BRAY,

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PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Appellate Department of the Superior Court of the State of California for the County of Orange.

Petitioner prays that a writ of certiorari issue to review the judgment of the Appellate Department of the Superior Court of the State of California for the County of Orange, entered in the above entitled case on September 6, 1967.

Opinions Below.

The action was tried in the Municipal Court of the Huntington Beach-Seal Beach Judicial District, County of Orange, State of California, before the Honorable Walter M. Charamza, a Judge of said court, and a jury. No written opinion was rendered by the trial judge, except that prior to trial, on petitioner's motion

to dismiss, the Court rendered a letter opinion to counsel, a copy of which in pertinent part is attached as Appendix A hereto [R. II, 37-38].[1]

The judgment of conviction was affirmed by the Appellate Department of the Superior Court of the State of California for the County of Orange. No written opinion was rendered by said court. A due and timely petition for rehearing was denied by the said Appellate Department without opinion.

No opinion was rendered by the Court of Appeal for the Fourth Appellate District, State of California, denying transfer on certification.

Jurisdiction.

The judgment of the court below [C. T. 78-80].[2] was dated and entered on September 6, 1967, and is attached as Appendix B hereto. A due and timely petition for rehearing [C. T. 81] was denied by the said court on September 19, 1967 [C. T. 88-89]. Petitioner's alternative petition to the court below for certification of transfer of the case to the Court of Appeal pursuant to Rule 63 of the California Rules of Court [C. T. 81] was granted by the said court below on the said September 19, 1967, and the Court certified important questions of law to be settled by the Court of Appeal [C. T. 88-89]. A copy of the aforesaid order and judgment denying petition for rehearing and granting the petition for certification together with a statement of the questions of law to be settled is attached as Appendix C hereto.

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[1]The reference "R. II" is to the Reporter's Transcript and Volume number of proceedings below.

[2]The reference "C. T." is to the Certified Transcript prepared by the clerk of the court below.

The Court of Appeal for the Fourth Appellate District, State of California, by order dated October 20, 1967 and entered on October 23, 1967, denied the transfer on certification. A copy of the said Order is attached as Appendix D hereto.

The decision of the aforesaid Court of Appeal denying transfer in the case herein became final immediately upon its filing on October 20, 1967. California Rules of Court, *Appellate Rules,* Rule 24(a). The California Supreme Court did not order the cause transferred to itself on its own motion within thirty days after the said decision became final [California Rules of Court, Appellate Rules, Rule 28(a)], and a petition for hearing in the California Supreme Court "may not be filed after denial of a transfer to a District Court of Appeal after certification in a case within the original jurisdiction of a municipal or justice court" [*Id.,* Rule 28(b)].

By the aforesaid denial of transfer, therefore, the Appellate Department of the Superior Court of the State of California for the County of Orange became the highest court of the State in which a decision could be had. California Constitution, Article VI, §§4, 4b, 4e, 5; California Penal Code 1471; California Rules of Court, Appellate Rules, *Rules on Transfer of Municipal and Justice Court of Appeals,* Rule 61 *et seq.*; California Rules of Court, Appellate Rules, Rules 24(a), 28(a), 28(b). *Smith v. California,* 361 U.S. 147, 148, n.2; *Virginia Ry. Co. v. Mullins,* 271 U.S. 220, 222.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

Questions Presented.

1. Whether California Penal Code §§311 and 311.2, as construed and applied herein to authorize conviction of petitioner upon the ground that the book *Just for Kicks* by Donna Powell is obscene and not entitled to constitutional protection, abridge the exercise of freedoms of speech and press and deprive petitioner of his liberty without due process of law, contrary to the free speech and press provisions of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

2. Whether California Penal Code §§311 and 311.2, as construed and applied herein to authorize conviction of petitioner without proof in the record that petitioner knew the contents of the books herein involved or knew that the contents were obscene, deprive petitioner of his liberty without due process of law and abridge the exercise of freedoms of speech and press, contrary to the free speech and press and due process of law provisions of the First and Fourteenth Amendments.

3. Whether California Penal Code §§311 and 311.2, as construed and applied herein to authorize a wholesale and warrantless search and seizure of unrelated books and magazines in petitioner's retail establishment for the purported purpose of obtaining evidence of "knowledge" and "setting", arbitrarily deprive petitioner of his right to be secure against unreasonable searches and seizures, deprive petitioner of his liberty and property without due process of law, authorize a prior restraint on the circulation of the press, and abridge the exercise of freedoms of speech and press, all contrary to the free speech and press, the search

and seizure provisions and the due process provisions of the First, Fourth and Fourteenth Amendments to the United States Constitution.

4. Whether California Penal Code §§311 and 311.2, as construed and applied herein to authorize the introduction into evidence of unrelated books and magazines obtained from petitioner's retail establishment for the purported purpose of proving "knowledge" and "setting" arbitrarily deprive petitioner of his liberty and property without due process of law and abridge the exercise of freedoms of speech and press, contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

5. Whether California Penal Code §§311 and 311.2, as construed and applied herein to authorize a conviction of petitioner without competent proof that the book involved herein exceeds the limits of candor in the Nation as a whole in the depiction or representation of matters pertaining to sex and nudity; or appeals to prurient interest; or is utterly without social importance, and where the record affirmatively establishes that the book is not obscene and is entitled to constitutional protection, deprive petitioner of his liberty and property without due process of law and abridge the exercise of freedoms of speech and press, contrary to the free speech and press and due process provisions of the First and Fourteenth Amendments.

Constitutional and Statutory Provisions Involved.

The pertinent provisions of the First, Fourth and Fourteenth Amendments to the Constitution of the United States and the provisions of California Penal Code §§311 and 311.2 are set forth in Appendix E hereto.

Statement of the Case.

(a) Petitioner was charged in a five-count complaint [C. T. 2] with violations of California Penal Code §311.2. Each of the counts of the complaint was in similar language. Count I charged a violation of the state obscenity statute by the sale of a book entitled *Just for Kicks* [Peo.'s Ex. 6; R. I, 33]. Count II of the complaint involved the book entitled *Surf Broad* [Peo.'s Ex. 1; R. I, 33]. Count III involved the book entitled *Madam Butch* [Peo.'s Ex. 2; R. I, 33]. Count IV involved the book entitled *Pay the Devil* [Peo.'s Ex. 4, R. I, 91-92]. Count V involved the book entitled *Leather Girls* [Peo.'s Ex. 5, R. I, 91].

The cause came on for trial before the Honorable Walter W. Charamza, Judge of the Municipal Court of the Huntington Beach-Seal Beach Judicial District, County of Orange, State of California, and a jury. The jury returned a verdict of not guilty with respect to Counts II, III, IV and V of the aforesaid complaint, and a verdict of guilty with respect to Count I of the said complaint, to wit, a violation of California Penal Code §311.2 on October 24, 1965 involving the book entitled *Just for Kicks* [C. T. 14-18].

(b) With respect to the book *Just for Kicks,* the sole book involved in these proceedings, the prosecution at the trial offered a witness, Sharon Beauchamp [R. I, 25], a secretary for the City of Huntington Beach in the Detective Bureau of the Police Department. On October 24, 1965, the witness visited the retail establishment of petitioner and purchased from a female clerk the said book *Just for Kicks* by Donna Powell for which she paid the price of $.95 [R. I, 26-27]. No one else was present at the time of the pur-

chase [R. I, 26]. The witness did not desire to purchase the book for herself; she had simply been sent to buy the book [R. I, 28].

On behalf of petitioner, Dr. Carolyn Sturak, the recipient of a Master's Degree and a Ph. D. Degree from the University of California at Los Angeles in American Literature [R. IV, 3-4], testified that she had extensive expertise in the field of novels and literature, including the genre of paperback books involved in the complaint herein [R. IV, 5]. The witness had read each of the books charged in the complaint [R. IV, 5-6] and testified that these books were the same general type as the many books she had had occasion to read during her lifetime [R. IV, 6]. The witness testified that she had read such works as *Fanny Hill, Tropic of Cancer,* and other books previously held entitled to constitutional protection by rulings of the courts and that, based upon said readings and her experience, none of the books named in the complaint substantially exceeded customary limits of candor in the description of sex or nudity [R. IV, 7-9, 16, 19, 24]. Specifically, with respect to the book *Just for Kicks,* the witness testified that the description of sexual activities contained in the book did not go beyond customary limits of candor in the description of such activities and that the book had social importance [R. IV, 19-24].

Petitioner, testifying on his own behalf [R. V, 19], stated that he had been a resident of the City of Huntington Beach for approximately thirty years; that he had operated a grocery business with his father for about fifteen years; and for the past three years had been at his present establishment in the liquor business [R. V, 19-20]. Petitioner stated that in addition

to books and magazines which were on racks in the store, the establishment also sold various items which could be found in supermarkets and grocery stores, such as glassware, canned goods, cigarettes, delicatessen and the like [R. V, 22]. Petitioner testified that the various books and magazines which he received were not ordered by him but simply delivered by truck once a week and placed on the racks by a deliveryman. Petitioner testified that he had not read the books named in the complaint, and specifically with respect to the book *Just for Kicks* petitioner could not recall ever having seen the book [R. V, 24-28, 35, 38, 39]. The petitioner testified that he had no knowledge that any of the books named in the complaint were obscene and stated that he never considered the books carried in his store to be obscene [R. V, 49].

On rebuttal, the People offered Dr. David Henry Malone, Chairman of the English Department and the Comparative Literature Program at the University of Southern California [R. VI, 6]. The witness testified that in his opinion there were only "two tests" for obscenity [R. VI, 39]; that books like *Tropic of Cancer* and Norman Mailer's *American Dream,* in his opinion, exceeded the customary limits of candor [R. VI, 33, 61]; that the mode of descriptions so far as candor was concerned in the book here involved, *Just for Kicks,* was about the same as the descriptions contained in *Tropic of Cancer* [R. VI, 82]. The witness conceded that the book contained a sketch of a plot, contained some conflict between characters in the book [R. VI, 28-29], and that while the book was in his opinion without social importance as literature he could not answer from the point of view of a sociologist or a psychiatrist or a historian [R. VI, 24].

William K. Tynes, an Investigator with the District Attorney for Orange County [R. I, 56], testified on behalf of the prosecution that on April 23, 1966, without a search warrant, he seized and removed various books and magazines from petitioner's retail establishment [R. I, 57-59]. The witness had been instructed prior to the seizure of the aforesaid material by a Lieutenant in the Police Department to search and seize all books at petitioner's establishment of the same "type" as a book entitled *Surf Broad* which the said Lieutenant had previously purchased [R. I, 76]. The witness himself had never read the book *Surf Broad* and, indeed, did not read any of the books that he seized [R. I, 77]. Despite the fact that he had not read the books which he seized he nevertheless was of the opinion that they were "similar" to the book which the Lieutenant had named [R. I, 80]. The witness also seized magazines upon the theory that they appeared to him to be "of some value in evidence" [R. I, 81] and because they were again "similar type material" [R. I, 82]. The books seized by the said witness were admitted by the trial court on the issue of "knowledge" and as evidence of "setting" [Peo.'s Ex. 16 (19 books); R. II, 32; R. III, 4]. The magazines seized by the said witness were admitted into evidence to show "setting" but not on the issue of "knowledge" [Peo.'s Ex. 15 (27 magazines), R. II, 32; R. III, 4]. The aforesaid material was admitted into evidence for the jury's consideration without regard to the contents of the material [R. III, 4]. Also admitted to show "knowledge" and "setting" were five other unrelated books purchased on a previous occasion by a police officer [Peo.'s Exs. 10-14; R. II, 31; R. III, 3-4].

How Federal Questions Are Presented.

Prior to trial, petitioner demurred to the complaint [C. T. 3-5] and moved to dismiss the proceedings upon the ground that the books named in the complaint were entitled to constitutional protection [C. T. 7-13]. In denying the said demurrer and motion to dismiss, the trial court held that the books named in the complaint were not entitled to constitutional protection as a matter of law [Appendix A; R. II, 37-38].

Objections were made throughout the trial to the admission of the books involved in the complaint upon the ground that the material was entitled to the protection of the "First Amendment to the United States Constitution applicable to state laws through the Fourteenth Amendment" [R. I, 30-32], and to the admission of the unrelated books which had been illegally seized or purchased as aforestated upon similar constitutional grounds [R. I, 34-55, 59-75, 82-87, 97-98; R. II, 17-37; R. III, 3-4].

At the conclusion of the People's case, petitioner moved the court for an acquittal and dismissal of the charges based upon the grounds that the books involved in the complaint were entitled to constitutional protection under the First and Fourteenth Amendments; that the prosecution had failed to present any evidence to support the essential ingredients of the offense charged in the complaint; that the record was barren of any proof of scienter on the part of petitioner, all in violation of the constitutional guarantees [R. III, 6-35]. At the conclusion of the entire case, petitioner again renewed the motions for acquittal and dismissal upon all the grounds which had been argued at

the close of the People's case [R. VII, 2-3]. A motion for a new trial based on similar constitutional grounds was thereafter denied [C. T. 20-20a].

Petitioner was sentenced to pay a fine of $1,000.00; a sentence of fifteen days in the County Jail was suspended and petitioner placed on three years' summary probation [C. T. 48].

On appeal to the court below, petitioner raised the same constitutional questions, to wit, that the book here involved was entitled to constitutional protection under the First and Fourteenth Amendments to the United States Constitution; that failure to prove scienter on the part of petitioner deprived petitioner of liberty and property without due process of law under the First and Fourteenth Amendments; that the introduction of illegally seized material violated petitioner's rights under the First, Fourth and Fourteenth Amendments; that failure to prove the statutory elements of obscenity was also contrary to the provisions of the First and Fourteenth Amendments [C. T. 70, 76]. Similar constitutional issues were raised on the petition for rehearing [C. T. 81]. In granting the alternative petition for certification of transfer, the court below certified important questions of law which were listed as follows: "Whether the constitutional guarantees of freedom of expression prevent the conviction herein"; "Whether irrelevant, immaterial, and illegally-seized material was introduced into evidence in violation of the California and United States Constitution"; "Whether P.C. Sections 311 and 311.2, as construed and applied by the instructions given relating to *scienter*, are unconstitutional in view of the provisions of the United States and California Constitu-

tions"; and "Whether P.C. Sections 311 and 311.2, as construed and applied by the trial court, violate constitutional guarantees of freedom of speech, due process, and equal protection of the law". [Appendix C; C. T. 88-89].

Reasons for Granting the Writ.

1. In the constitutional sense, the book *Just for Kicks* by Donna Powell involved herein is neither obscene nor otherwise unlawful. The judgment of conviction based upon the aforesaid book results in an unconstitutional application of the state obscenity statute, contrary to the express guarantees of the free speech and press and due process provisions of the First and Fourteenth Amendments.

The book herein is comparable in its description of sex to those writings which have been found not to exceed the limits of candor in the Nation as a whole, or to have some social importance justifying their protection under the First Amendment. So far as the essential elements of obscenity are involved, as was defined by this Court in *Roth v. United States,* 354 U.S. 476; *Jacobellis v. Ohio,* 378 U.S. 184; *Memoirs v. Massachusetts,* 383 U.S. 413; and *Redrup v. New York,* 386 U.S. 767, there is no significant difference between the book herein involved and the material deemed constitutionally protected in the cases decided by this Court and other federal and state courts. See, *Grove Press v. Gerstein,* 378 U.S. 577 (*Tropic of Cancer*); *Tralins v. Gerstein,* 378 U.S. 576 (*Pleasure Was My Business*); *Memoirs v. Massachusetts,* 383 U.S. 413 (*Fanny Hill*); *Redrup v. New York,* 386 U.S. 767 (*Lust Pool* and *Shame Agent*); *Aday v. United States,* 388 U.S. 447 (*Sex Life of a Cop*);

Books, Inc. v. United States, 388 U.S. 449 (*Lust Job*); *Quantity of Copies of Books v. Kansas,* 388 U.S. 452 (*Sin Hooked, Bayou Sinners, Lust Hungry, Shame Shop, Fleshpot, Sinners Seance, Passion Priestess, Penthouse Pagans, Shame Market, Sin Warden* and *Flesh Avenger*); *Corinth Publications, Inc. v. Wesberry,* 388 U.S. 448 (*Sin Whisper*); *Keney v. New York,* 388 U.S. 440 (*Sin Servant, Lust School* and *Lust Web*); *Mazes v. Ohio,* 388 U.S. 453 (*Orgy Club*); *Friedman v. New York,* 388 U.S. 441 (publications entitled "Bondage Boarding School", "English Spanking School", "Bound and Spanked", "Sweeter Gwen", "Travelling Saleslady Gets Spanked", "Bound to Please", "Bizarre Summer Rivalry", "Heat Wave" and "Escape Into Bondage, Book No. 2"); *Sheperd v. New York,* 388 U.S. 444 (sets of photographs and the following publications: "Promenade Bondage", "Spanking Nurses", "Spanking Sisters" and "Bondage"); and *Avansino v. New York,* 388 U.S. 446 (packets of photographs and the publication entitled "Promenade Bondage Vol. 4".[3]

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[3]See also, *Austin v. Kentucky,* 386 U.S. 767 (magazines entitled "Spree", No. 38, and "High Heels", Vol. 2, No. 6); *Gent v. Arkansas,* 386 U.S. 767 (magazines entitled "Gent", "Swank", "Bachelor", "Ace", "Cavalcade", "Gentleman" and "Sir"); *Rosenbloom v. Virginia,* 388 U.S. 450, ("Solis", a magazine printed in German, and also 107 other nudist magazines); *Ratner v. California,* 388 U.S. 442 (motion picture film "Honey Bee"); *Cobert v. New York,* 388 U.S. 443 (motion picture films "Jane Palmer No. 2", "M. Jordan" and "Jayne Tracy"); *Schackman v. California,* 388 U.S. 454 (girlie pictures in coin operated peep shows: D-15, 0-12, 0-7, B-1 and B-19); *Central Magazine Sales, Ltd. v. United States,* 88 S. Ct. 235 (girlie magazine "Exclusive", and nudist magazines "International Nudist Sun", No. 16, and "Review International", No. 6); *Potomac News Co. v. United States,* 88 S. Ct. 233 (male nudist magazine "Hellenic Sun Number Two"); *Connor v. City of Hammond,* 88 S. Ct. 234 ("girlie" magazines); and *Chance v. California,* 88 S. Ct. 253 (nude pictures).

See also, *Grant v. United States,* 380 F. 2d 748 (9 Cir. 1967), decided after the aforesaid decisions of this Court reversing a judgment of conviction and holding that the books *Swish! Bottom!, Screaming Flesh* and *The Holdout* were entitled to constitutional protection; *Commonwealth v. Dell Publications, Inc., et al.,* 233 A. 2d 840 (Pa., 1967) holding the book *Candy* to be entitled to constitutional protection.

Neither in language nor in theme does the book herein approach the candor of discussion or the explicitness of language that is found in writings of many authors generally accepted and widely read by the public. The book herein contains a plot and story-line with characters and incidents relevant to such plot and theme. As Dr. Sturak, the expert witness testifed on behalf of petitioner, the description of sexual activities contained in the book herein are no more candid than those found in classical literature and in modern contemporary works [R. IV, 19-23]. The witness also testifed that the book had social importance, reflecting as it does the modern problems of social responsibility and the influences of the use of drugs in social relationships [R. IV, 23-24].

The case herein does not involve a statute which reflects a "specific and limited state concern for juveniles", nor does the case involve any "assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it", nor was there any evidence in the case herein of the sort of "pandering" which the Court found significant in *Ginzburg v. United States.* See, *Redrup v. New York,* 386 U.S. 767. As the record reveals, an employee of the Police Department was

sent to petitioner's retail establishment for the specific purpose of purchasing the book herein involved, and petitioner was not even at the premises when the book was purchased from a female clerk.

In view of the record herein and the decisions of this Court, it is submitted the judgment of conviction rendered herein cannot stand in the light of the protective provisions of the First and Fourteenth Amendments.

2. The record is barren of any proof of scienter on the part of petitioner. The record is uncontradicted that the petitioner had no knowledge of the contents of the writing, and it is equally clear that petitioner had no reason to believe, nor did he believe, that the book was obscene or otherwise unlawful. The sole witness produced by the prosecution with respect to the book involved herein testified that she was an employee of the Police Department, and purchased the book not for herself but simply at the behest of the police. The book was purchased from a clerk in the retail establishment; no one else was present at the time of the sale. Petitioner testified that he had never read any of the books in his store, including the book here involved, and testified that he could not recall ever having seen the book.

In short, there is nothing in the record to show that petitioner either knew the contents of the writing or knew that the contents were obscene as alleged in the complaint. The conviction under the obscenity statute herein, as construed and applied to petitioner to justify his conviction without the slightest proof of scienter, violates the free speech and press and due process provisions of the First and Fourteenth Amendments. *Smith v. California*, 361 U.S. 147.

So far as issues of petitioner's allegedly unlawful knowledge and intent are concerned relative to the purported obscenity of the book herein involved, there is no probative evidence in the record to support the judgment of conviction. Under the governing standards elucidated in the opinions of this Court, the State manifiestly failed to meet the strict burden of proof imposed upon the State under the Constitution when First Amendment rights are involved. *New York Times Co. v. Sullivan,* 376 U.S. 254; *Garrison v. Louisiana,* 379 U.S. 64; *Manual Enterprises, Inc. v. Day,* 370 U.S. 478; *Schneiderman v. United States,* 320 U.S. 118; *Baumgartner v. United States,* 322 U.S. 665; *Hartzel v. United States,* 322 U.S. 680. See also, *Thompson v. Louisville,* 362 U.S. 199, 206, n.13.

3. The state obscenity statute has been construed to authorize a wholesale and warrantless search and seizure of books and magazines in a retail establishment for the purported purpose of obtaining evidence of "knowledge" and "setting". In the view of the State, a police officer may enter a retail establishment where books and magazines are sold and seize all books and magazines which he, in his own subjective wisdom, may deem to be "evidence" which bears on issues of "knowledge" and "setting" relative to a specific book sold months before by a clerk to a police agent.

Thus, in the case herein, numerous books and magazines, constitutionally protected material, were seized on April 23, 1966, without warrant, and removed from the premises purportedly to be used as evidence on "intent" and "setting" relative to the sale of the book herein involved on October 24, 1965. The question as to whether or not books and magazines shall

be seized in a retail establishment was left to the unfettered decision of an investigator for a district attorney with a resultant suppression of material which ordinarily enjoys the protection of the First Amendment and to which the community is ordinarily entitled to access.

The approval of the exercise of such unbridled power by officials of government raises questions of great constitutional significance. This Court has held that state procedures which authorize the seizure of material by a police officer ordinarly entitled to the protection of the First Amendment, without any prior approval by a judicial officer, does violence to the First, Fourth and Fourteenth Amendments to the United States Constitution. *Marcus v. Search Warrants of Property,* 367 U.S. 717; *Quantity of Copies of Books v. Kansas,* 378 U.S. 205; *Stanford v. Texas,* 379 U.S. 476. The consequence of permitting arbitrary seizures by police officers of material on the pretext that such material is deemed "obscene" or deemed necessary as evidence of "knowledge" or "setting" is the suppression of such material and the withholding from the public for lengthy periods of time of communications which are entitled to constitutional protection. The procedures which have been authorized here by the State permits police officers and other law enforcement officers to exercise an unfettered discretion without any step in the procedure before the seizure designed to focus searchingly on the question of whether or not the material can possibly have any bearing on issues of knowledge or setting.

The state obscenity statute as thus construed and applied creates a system of prior restraint of expression

limitless in scope. Such a system "comes to this Court bearing a heavy presumption against its constitutional validity". *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 70. The statute permits wholesale seizures of writings contrary to the provisions of the First and Fourth Amendments as subsumed into the due process provisions of the Fourteenth Amendment. To seize books and magazines under the circumstances presented in the record herein, and suppress their circulation, is to create a judicial "instrument for stifling liberty of expression" (*Marcus v. Search Warrants, supra,* 367 U.S. at 729) which the Bill of Rights was intended to outlaw. *Freedman v. Maryland,* 380 U.S. 51.

4. All of the unrelated material so illegally seized from petitioner's store and other unrelated books purchased on different occasions were admitted into evidence by the trial court on the purported basis of proving "knowledge" or "setting". It is submitted that it was constitutionally impermissible to place such unrelated evidence before the jury.

On the issue of scienter, the only question presented in the case was whether or not the petitioner knew the contents of the book *Just for Kicks,* and whether he knew that the contents were obscene, as alleged. On this issue, the prosecution was unable to present any evidence. The fact that petitioner had a retail establishment which, among other things, contained books and magazines dealing with sex could in no way establish that petitioner knew the contents of the specific book *Just for Kicks,* or in any way prove that petitioner knew that this specific book was unlawful as alleged. The covers and blurbs on the unrelated books and magazines which were introduced into evidence were

no different in any significant degree from the covers and blurbs on books and magazines which have been held to be entitled to constitutional protection by decisions of this Court and other state and federal courts.

The introduction of all of the said material to show "setting" was equally impermissible. There was no evidence in the record that petitioner sold the specific book involved herein, nor any evidence that petitioner made any statement or representation with respect to the specific book *Just for Kicks*. The book in fact was purchased from a clerk by a police agent when nobody else was present in the establishment. The fact that numerous magazines and books were sold on book racks in the petitioner's store in no way established, it is submitted, the alleged obscenity of the specific book involved herein, or the knowledge or intent of petitioner with respect thereto.

The construction of the state obscenity statute to permit the introduction of this totally unrelated material on the issue of knowledge and setting is merely an indirect method of seriously restricting the circulation of books and magazines entitled to constitutional protection and to impose guilt upon booksellers even though they had not the slightest notice of the character of the books sold. The effect of the rulings by the court below is to erode fundamental freedoms of speech and press and due process guarantees by holding a retail bookseller criminally liable for the sale of an allegedly obscene book, "wholly apart from any scienter on his part regarding the book's obscenity." *Smith v. California,* 361 U.S. 147, 160.

The fact that a retail bookseller has other books and magazines in his establishment dealing with sex and nudity in no way establishes, it is submitted, that a particular book charged in a complaint is obscene or that the retailer knew it to be obscene. Sex is not obscenity, and as Justice Harlan stated in *Roth v. United States,* 354 U.S. 476, 497: "Every communication has an individuality and 'value' of its own." The wholesale introduction of unrelated books and magazines into evidence in an obscenity prosecution for the purported purpose of establishing "knowledge" or "setting" subverts the constitutional safeguards for freedoms of speech and press. Books do not become obscene by association, and guilty knowledge cannot be inferred from lawful possession. "When the State undertakes to restrain unlawful advocacy it must provide procedures which are adequate to safeguard against infringement of constitutionally protected rights—rights which we value most highly and which are essential to the workings of a free society." *Speiser v. Randall,* 357 U.S. 513, 521.

5. On its direct case, the prosecution made no attempt to prove that the book herein, *Just for Kicks,* substantially exceeds contemporary standards in the depiction or representation of sex and nudity; or appeals to a prurient interest; or is utterly without social importance. All that was introduced into evidence was the book itself. The oral and documentary testimony introduced into evidence by petitioner on his behalf established that the book was in all respects comparable to other writings which had been held constitutionally protected and which freely circulated throughout the Nation. With respect to the book involved herein, the

prosecution's only witness on rebuttal conceded that the book was no more candid than such books as *Tropic of Cancer* and other books which have been held to be constitutionally protected and freely circulate in the Nation. Moreover, the witness admitted that he could not testify with respect to the social importance of the book in general but only with respect to its importance as literature. In short, the prosecution failed to prove the essential ingredients of the offense charged in the complaint, and the affirmative evidence in the case establishes that the book does not exceed contemporary standards, nor appeal to prurient interest; and has social importance.

Thus, petitioner here has been convicted under a statute in which there was a failure to prove the essential elements of the alleged crime. A state criminal procedure which permits conviction without proof of the existence of every element necessary to constitute the crime charged does violence to the due process provisions of the Constitution, and "where the transcendent value of speech is involved", due process certainly requires "that the State bear the burden of persuasion to show that the [accused] engaged in criminal speech". *Speiser v. Randall,* 357 U.S. at 526. See also, *Tot v. United States,* 319 U.S. 463; *Thompson v. Louisville,* 362 U.S. 199; *Garner v. Louisiana,* 368 U.S. 157; *New York Times Co. v. Sullivan,* 376 U.S. 254; *Garrison v. Louisiana,* 379 U.S. 64; *Freedman v. Maryland,* 380 U.S. 51.

Unless the burden of proof in obscenity prosecutions is meticulously maintained, constitutionally protected writings may be suppressed, and individuals involved in their circulation punished, under unproved charges.

The right to be heard before condemnation is hardly meaningful if the accuser is relieved of the burden of proving his accusation. Rights guaranteed by the First and Fourteenth Amendments cannot be protected where a criminal trial is drained of the basic elements of a fair trial, where "the whole proceeding is a mask". *Moore v. Dempsey,* 261 U.S. 86, 91. Plainly, if it is a sheer denial of due process to convict a person upon a charge not made, or a charge not tried, it is equally arbitrary to rest a conviction upon a charge not proved. *DeJonge v. Oregon,* 299 U.S. 353, 362; *Cole v. Arkansas,* 333 U.S. 196, 201; *Thompson v. Louisville,* 362 U.S. 199, 206.

Conclusion.

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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